

Supreme Court, U. S.
FILED

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. **77-1019**

LIVESTOCK MARKETERS, INC. and PAULK AND BATTEN
LIVESTOCK COMPANY, INC.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
for the Fifth Circuit

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The Petitioners, Livestock Marketers, Inc. and Paulk and Batten Livestock Company, Inc., and each of them, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on September 1, 1977.

OPINION BELOW

The Opinion of the Court of Appeals for the Fifth Circuit appears in the Appendix to this Petition.

JURISDICTION

The Judgment of the Court of Appeals for the Fifth Circuit was entered on September 1, 1977. A timely Petition for Re-hearing was denied on October 20, 1977, and this Petition for Certiorari was filed within ninety (90) days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

A Complaint naming Petitioners was filed by the Packers and Stockyards Administration, U.S.D.A., alleging violations of the Packers and Stockyards Act, 1921, as Amended and Supplemented (7 U.S.C. 181 et seq.). Violations of said Act were found as against Livestock Marketers, Inc. As against Paulk and Batten Livestock Company, Inc., a separate and distinct entity, violations were neither alleged nor found. Sanctions were ordered against both Petitioners.

1. Where no wrongdoing was alleged or found as against Petitioner Paulk and Batten Livestock Company, does the application of sanctions against same, in disregard of the corporate entity, constitute a denial of Due Process as guaranteed to Petitioner Paulk and Batten by the Fifth Amendment to the Constitution?

2. Is the Finding against Petitioners of a wilfull violation of the Packers and Stockyards Act unwarranted and unsupported by substantial evidence?

STATUTORY PROVISIONS INVOLVED

United States Code, Title 7: §§ 204, 208, 210(c), 213(a), 221, 312(a), 401 (see Appendix to the Petition).

Code of Federal Regulations, § 9: 201.49, 201.55, 201.71, 201.-72, 201.46(a) (see Appendix to the Petition).

STATEMENT OF THE CASE

(In accordance with revised Rule 21(1) of the United States Supreme Court, the record is not included with this Petition. However, references are made to the Appendix filed with the Appeal to the United States Court of Appeals for the Fifth Circuit (APP. . . .), and to the transcript of the hearing before the Secretary of Agriculture (R. . . .).) Petitioner Livestock Marketers, Inc. is a livestock auction company and is a Georgia Corporation having been chartered in 1963. Petitioner Paulk and Batten Livestock Company, Inc. is a livestock dealer and trucking company and is a Georgia Corporation having been chartered in 1968. The officers of Petitioner Corporations, as recorded on their respective registrations filed with the Secretary of Agriculture, are as follows:

Paulk and Batten Livestock Company, Inc.	Livestock Marketers, Inc.
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Herbert Batten—President	Secretary-Treasurer
Thurston Paulk—Vice President	Vice President
Johnny Batten—Secretary-Treasurer	Director
Marvin Giddens—Director	President

Each of the above named officers own twenty-five (25%) per cent of the stock of each Corporation. (App. 219-220). On April 22, 1975, a Complaint was filed by the Packers and Stockyards Administration, U.S.D.A. hereinafter Respondent, charging Petitioners with wilfully violating the provisions of the Packers and Stockyards Act 1921, as Amended and Supplemented (7 U.S.C. 181 et seq.), hereinafter the Act, and the regulations promulgated thereunder by the Secretary of Agriculture (9 C.F.R. 201.1 et seq.), hereinafter referred to as the

regulations. (App. 5-13), Specifically, it was alleged that Petitioners had knowingly engaged in short-weighing livestock, and had issued accounts of purchase, and paid sellers therefor on the basis of the false weights.

Petitioners filed their answer on May 16, 1975, denying any wrongdoing which amounted to a violation of the Act or the regulations. (App. 14-19). A hearing was afforded Petitioners before Administrative Law Judge Dorothea A. Baker, a hearing examiner of the U. S. Department of Agriculture, on January 14 and 15, 1976.

The charges against Petitioners resulted from an investigation conducted by agents of Respondent during August of 1974.

On August 14, 1974, Respondent's agents purchased twenty-one (21) hogs at Hawkinsville, Georgia. (App. 28). Fourteen (14) of the twenty-one (21) hogs were to be used in connection with the investigation of Petitioners' operations. (App. 28-29). Seven (7) of the fourteen (14) hogs were to be sold to Livestock Marketers, Inc. the following day, and were placed that night in a dry-lot, without access to food and water. (App. 29). The following morning, Respondent's agents returned to weigh the seven (7) hogs. (App. 32, 39-40). The scale used for this purpose was a 3,000 pound capacity single-animal scale graduated in one pound increments which had been mounted on the bed of a two-ton Dodge truck. (App. 26-27). After weighing the hogs, Respondent's agents carried them to the facilities of Livestock Marketers, Inc. at Douglas, Georgia. (App. 56). Employees of Livestock Marketers, Inc. thereupon weighed the hogs in two separate drafts. (App. 56-57). The variations between the weights as recorded by the Respondent's agents and the weights as recorded by Livestock Marketers, Inc. were as follows: (App. 200).

Respondent		Livestock Marketers	Pound Variation	% Variation
Draft One				
(6 hogs)	1299	1290	9	0.7
Draft Two				
(1 hog)	354	349	9	2.5

Later that day, Respondent's agents returned to Hawkinsville, Georgia, and placed an additional seven (7) hogs in the dry-holding pen for the night. (App. 89). The following morning, the same process was repeated. Seven (7) hogs were weighed on Respondent's scale and carried for sale to Livestock Marketers, Inc. facility. (App. 90-96). Thereupon, employees of Livestock Marketers, Inc. weighed the seven (7) hogs in three separate drafts and the following variances were noted: (App. 213).

Respondent		Livestock Marketers	Pound Variation	% Variation
Draft One				
(1 hog)	283	280	3	1.1
Draft Two				
(3 hogs)	672	665	7	1.04
Draft Three				
(3 hogs)	713	705	8	1.1

An additional fourteen (14) hogs were purchased by Respondent's agents on August 21, 1974, and seven (7) of these were dry-lotted until the morning of August 23. (App. 105-107). Thereupon, the hogs were weighed on Respondent's scale and carried to facilities of Livestock Marketers, Inc. to be sold. (App. 107-114). Variations were again found in the weights of the livestock: (App. 211).

Respondent		Livestock Marketers	Pound Variation	% Variation
Draft One (1 hog)	344	335	9	2.6
Draft Two (6 hogs)	1313	1300	13	.9

After this third visit by agents of the Respondent, the same identified themselves, revealed the purposes of their visit and asked to check the balance of Livestock Marketers, Inc. scale to test it for accuracy. (App. 124-125). The scale was found to be back balanced by five (5) pounds, and further testing indicated that based upon U. S. Government standards, the same was an acceptable scale for weighing livestock and was well within acceptable tolerances. (App. 124-125). The State of Georgia had tested the same scale on July 3, 1974, and had approved the accuracy of the scale. (R. 679). The only evidence of intentional short-weighing was the fact that the scale was found to be in a back balanced condition, (App. 124-125) and a witness for Respondent offered the opinion that the scale was placed in that condition willfully, (R. 43), and scale tickets, had not been issued (App. 235).

The transactions of the weighing of the hogs on each date complained of (August 15, 16, and 23, 1974) were with Petitioner Livestock Marketers, Inc., and no weighing by Petitioner Paulk and Batten Livestock Company, Inc. was shown or established. No wrongdoing was alleged, put in issue, or shown by the evidence with respect to Petitioner Paulk and Batten Livestock Company, Inc. (App. 235).

On June 24, 1976, Judge Baker handed down her decision and order. (App. 214-244). Petitioners, and each of them, were ordered to cease and desist from various practices involving short-weighing of livestock and were ordered suspended as registrants under the Act for a period of seven (7) days. (App.

243-244). On appeal by both the Petitioners and the Respondents to the Secretary of Agriculture, a decision and order was handed down on October 12, 1976, in which Petitioners were ordered to cease and desist from various practices as set out in the initial decision and order and in which the initial suspensions of seven (7) days were increased to thirty (30) days. (App. 245-268).

Petitioners appealed to the United States Court of Appeals for the Fifth Circuit which Court affirmed the decision and order of the Judicial Officer in its judgment rendered September 1, 1977. The per curiam opinion of the Court of Appeals is contained in the Appendix to this Petition. The Court of Appeals took jurisdiction based on Title 28, §§ 2342 and 2343 of the United States Code.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Raises Important and Recurring Questions Concerning the Disregard of the Corporate Entity in Applying Administrative Sanctions, and the Constitutional Ramifications Thereof, Absent a Finding of Wrongdoing.

The Supreme Court has held that in an administrative proceeding such as that at issue herein, the Secretary's choice of sanction is not to be overturned unless it is found to be unwarranted in law or without justification in fact. *Butz v. Glover Livestock Commission Company*, 411 U.S. 182 (1973). In its decision below, the Fifth Circuit affirmed the imposition of sanctions against Petitioner Paulk and Batten Livestock Company, Inc. In the same breath the Court conceded that,

"none of the short-weight disclosing purchases set out by Government agents involved Paulk and Batten. None of the violations found may be tied directly to that Corporate entity." (Appendix to Petition).

The opinion of the Fifth Circuit flies in the face of the *Glover* decision in that while no wrongdoing was alleged or shown against Petitioner Paulk and Batten Livestock Company, Inc. the sanction is nonetheless allowed to stand. Additionally, the Fifth Circuit abandons its own standard of review as announced in *Kent v. Hardin*, 425 F 2d 1346 (Fifth Cir. 1970).

"The function of a Court in reviewing administrative imposition of sanctions . . . (is) to see if they bear a reasonable relation to the practices which invoked them and if they evidence such a relation, to approve them." 425 F 2d 1349-1350.

Can any sanction, great or small, properly be imposed where no wrongdoing is found?

Bruhn's Freezer Meats of Chicago v. United States Department of Agriculture, 438 F 2d 1332 (Eighth Cir. 1971), affirmed a decision imposing a cease and desist order on both corporate and individual petitioners. The Court expressed fear that the individual petitioner might circumvent the sanction by gathering beneath the cloak of a new corporation. Such reasoning is inapposite to the facts herein. We deal not with individuals but with two distinct corporations. No showing has ever been made that Paulk and Batten Livestock Company, Inc., a corporation in existence since 1968, was meant to provide, or would be used as a cloak for the circumvention of sanctions against Livestock Marketers, Inc.

Sebastopol Meat Company v. Secretary of Agriculture, 440 F 2d 983 (Ninth Cir. 1971), affirmed sanctions against a corporate and individual petitioner. However, the individual involved was found to be the alter ego of the corporate petitioner. Here we deal not with sanctions against individuals on the basis of corporate acts, but with sanctions against two distinct corporations, based on acts of the one.

Corn Products Refining Company v. Benson, 232 F 2d 554 (Second Cir. 1956), involved a complaint under the commodity exchange act, in which sanctions were applied against the corporate petitioner and its wholly owned subsidiary, and the corporate entity was disregarded to give effect to the statute. However, the facts herein show once more a crucial distinction: two separate and distinct corporate entities as opposed to the wholly owned subsidiary in *Corn Products*.

In *Bangor Punta Operations, Inc. v. Bangor and Aroostook Railroad Company*, 417 U.S. 703 (1974) the Plaintiff sought damages for violations of the Federal Antitrust and Securities Laws. Where the real party in interest was a corporation owning 99% of the Plaintiff's stock, the Supreme Court opted to disregard the corporate form. Again, *Bangor Punta*, on its

facts, involved virtually total ownership of one corporation by the other. Petitioners herein are separate and distinct corporate entities.

It has long been settled that a corporation is a person entitled to the protection of the due process clauses of the Fifth and Fourteenth Amendments to the Constitution. *Grosjean v. American Press Company*, 297 U. S. 233 (1936). Hence, a corporation's business is "property" within the meaning of the Constitutional provisions concerning due process of law. *Louis K. Liggett Company v. Baldridge*, 278 U.S. 105. On the facts disclosed herein, to disregard the corporate entity in order to bring Petitioner Paulk and Batten Livestock Company, Inc. within the ambit of the sanctions, and the suspension thereunder, is to deprive Paulk and Batten of property without the Due Process guarantees of the Fifth Amendment. Especially is this so in light of the fact that no wrongdoing whatsoever was alleged or found as against Paulk and Batten. It has been held that, "... an administrative order without factual support is without due process." *Garvey v. Freeman*, 397 F. 2d 600, 610 (Tenth Cir. 1968). In applying sanctions against Paulk and Batten Livestock Company, Inc. the Secretary, in effect, attempts to punish a party expressly found innocent of any wrongdoing, and absent the requisite factual support, such action is wholly outside the parameters of due process.

By reason of the foregoing, and the important and recurrent constitutional question raised by disregard of the corporate entity herein, the Court should grant Certiorari to review the decision below.

2. Serious Doubt Exists as to Whether the Finding of Wilful Violation of the Packers and Stockyards Act Was Supported by Substantial Evidence.

The scope of judicial review of facts where determination is made by the Secretary is limited to whether they are supported

by substantial evidence. *Butz v. Glover Livestock Commission Company*, 411 U.S. 182 (1973). Reference to the administrative procedure act (5 U.S.C. § 706(2)(E)) reveals that an administrative action thereunder should not be set aside unless unsupported by substantial evidence.

However, the "substantial evidence" rule should not be permitted to shield an administrative action, or the record on which it is based, from the searching light of judicial review. "Substantial evidence is more than a mere scintilla", and administrative orders cannot be justified without "... a basis in evidence having rational probative force." *Consolidated Edison Company v. NLRB*, 305 U.S. 197, 229-230 (1938). The reviewing court, in appraising the evidence, must consider the whole record. "The substantiality of evidence must take into account whatever in the record fairly detracts from its weight." *Universal Camera Corporation v. NLRB*, 340 U. S. 474, 488 (1951).

Those items of evidence relied upon to find intentional short-weighting are as follows:

1. The fact that the scale used by Petitioner Livestock Marketers, Inc. was found to be in a back balanced condition;
2. The opinion testimony of an employee of Respondent, and one who participated in the investigation, that the scale was intentionally placed in a back balanced condition;
3. The fact that scale tickets were not issued to the sellers of livestock.

No other evidence whatsoever appears in the record to support a finding of wilful short-weighting. No employee of Livestock Marketers, Inc. was ever seen to place the scale in a back balanced condition. (see Statement of the Case). The record on which this administrative action and the resultant sanctions is based, is not supported by substantial evidence, but rather by

a "scintilla". A "mere scintilla" is not enough. *Consolidated Edison Company, supra*.

Additionally, it has been held that in the absence of prior warnings, a finding of wilfulness is erroneous. *Economou v. United States Department of Agriculture*, 494 F. 2d 519 (Second Cir. 1974). Here, the warning may have resulted in prompt correction of the scale. But, the only evidence of any prior warnings given to Petitioners is a letter written only to Livestock Marketers, Inc., in which there is no mention of short-weighing, but merely reference to alleged "weighing discrepancies." Nothing in the record indicates that Paulk and Batten Livestock Company, Inc. received any type of prior warning.

By reason of the foregoing, the court should grant Certiorari to review the decision below.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

G. HUGHEL HARRISON
P. O. Box 88
Lawrenceville, Georgia 30246

Certificate of Service

I hereby certify that on this 16th day of January, 1978, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid to Ms. Freddi Lipstein and Mr. Ronald R. Glancz, Department of Justice, Civil Division, Appellate Section, Washington, D. C. 20530, Counsel for Respondent. I further certified that all parties required to be served have been served.

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APPENDIX

— A-1 —

STATUTORY AND REGULATORY ADDENDUM

The pertinent sections of the Packers and Stockyards Act, 7 U.S.C. 181 *et seq.*, provide:

7 U.S.C. 204:

§ 204. Bond and suspension of registrants

On and after July 12, 1943 the Secretary may require reasonable bonds from every market agency and dealer, under such rules and regulations as he may prescribe, to secure the performance of their obligations, and whenever, after due notice and hearing, the Secretary finds any registrant is insolvent or has violated any provisions of this chapter he may issue an order suspending such registrant for a reasonable specified period. Such order of suspension shall take effect within not less than five days, unless suspended or modified or set aside by the Secretary or a court of competent jurisdiction. July 12, 1943, c. 215, § 1, 57 Stat. 422.

7 U.S.C. 208:

§ 208. Unreasonable or discriminatory practices generally; rights of stockyard owner of management and regulation

(a) It shall be the duty of every stockyard owner and market agency to establish, observe, and enforce just, reasonable, and nondiscriminatory regulations and practices in respect to the furnishing of stockyard services, and every unjust, unreasonable, or discriminatory regulation or practice is prohibited and declared to be unlawful.

(b) It shall be the responsibility and right of every stockyard owner to manage and regulate his stockyard in a just,

reasonable, and nondiscriminatory manner, to prescribe rules and regulations and to require those persons engaging in or attempting to engage in the purchase, sale, or solicitation of livestock at such stockyard to conduct their operations in a manner which will foster, preserve, or insure an efficient, competitive public market. Such rules and regulations shall not prevent a registered market agency or dealer from rendering service on other markets or in occasional and incidental off-market transactions.

As amended July 31, 1968, Pub.L. 90-446, § 1(d), 82 Stat. 475.

7 U.S.C. 210(c):

(c) The Secretary may at any time institute an inquiry on his own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made to or before the Secretary, by any provision of sections 201-203 and 205-217a of this title, or concerning which any question may arise under any of the provisions of such sections, or relating to the enforcement of any of the provisions of such sections. The Secretary shall have the same power and authority to proceed with any inquiry instituted upon his own motion as though he had been appealed to by petition, including the power to make and enforce any order or orders in the case or relating to the matter or thing concerning which the inquiry is had, except orders for the payment of money.

7 U.S.C. 213(a):

§ 213. Prevention of unfair, discriminatory, or deceptive practices

(a) It shall be unlawful for any stockyard owner, market agency, or dealer to engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in connec-

tion with determining whether persons should be authorized to operate at the stockyards, or with receiving, marketing, buying, or selling on a commission basis or otherwise, feeding, watering, holding, delivery, shipment, weighing, or handling, in commerce, of livestock.

7 U.S.C. 221:

§ 221. Accounts and records of business; punishment for failure to keep

Every packer or any live poultry dealer or handler, stockyard owner, market agency, and dealer shall keep such accounts, records, and memoranda as fully and correctly disclose all transactions involved in his business, including the true ownership of such business by stockholding or otherwise. Whenever the Secretary finds that the accounts, records, and memoranda of any such person do not fully and correctly disclose all transactions involved in his business, the Secretary may prescribe the manner and form in which such accounts, records, and memoranda shall be kept, and thereafter any such person who fails to keep such accounts, records, and memoranda in the manner and form prescribed or approved by the Secretary shall upon conviction be fined not more than \$5,000, or imprisoned not more than three years, or both. Aug. 15, 1921, c. 64, § 401, 42 Stat. 168; Aug. 15, 1921, c. 64, § 503, as added Aug. 14, 1935, c. 532, 49 Stat. 649.

The pertinent sections of the Packers and Stockyards Administration, Department of Agriculture (Chapter II) Regulations 9 C.F.R. 201 *et seq.*, provide:

9 C.F.R. 201.49(a):

§ 201.49 Requirements regarding scale tickets evidencing weighing of livestock

(a) When livestock is weighed for purpose of purchase or sale, a scale ticket shall be issued which shall show: (1) The name and location of the agency performing the weighing service; (2) the date of the weighing; (3) the name of the buyer and seller or consignor, or a designation by which they may be readily identified; (4) the number of head; (5) kind; (6) actual weight of the livestock; and (7) the name, initials, or number of the person who weighed the livestock, or if required by State law, the signature of the weighmaster. Scale tickets issued under this section shall be serially numbered and sufficient copies executed to provide a copy to all parties to the transaction.

§ 201.46 Stockyard owners, market agencies, dealers, and licensees to keep daily record

(a) Each stockyard owner, in addition to other necessary records, shall make and keep an accurate record of the number of head of each class of livestock received, shipped, or disposed of locally each day. Each market agency or dealer buying or selling livestock on a commission basis or otherwise, except packer buyers registered as dealers to purchase livestock for slaughter only, in addition to other necessary records, shall make and keep an accurate record of the number and weight of livestock bought, sold, or otherwise disposed of each business day, the prices paid or received therefor, and the charges made for services.

(b) Each licensee buying or selling live poultry on a commission basis or otherwise, in addition to other necessary records, shall make and keep an accurate record of the number of pounds of live poultry bought or sold each

business day, the prices paid or received therefor, and the charges made for services and facilities.

[19 F.R. 4528, July 22, 1954, as amended at 24 F.R. 3183, Apr. 24, 1959]

9 C.F.R. 201.55:

§ 201.55 Purchases and sales to be made on actual weights

When livestock or live poultry is bought or sold on a weight basis in transactions subject to the provisions of the act, settlement therefor shall be on the basis of the weight shown on the scale ticket or correction ticket, as the case may be. Any weight figures shown on accounts of sale, accounts of purchase, invoices, bills, or statements issued in connection with transactions subject to the act shall be actual weights obtained on scales operated or used by stockyard owners, market agencies, dealers, or packers, in the case of livestock, or on scales operated by licensees, in the case of live poultry, at the place and at the time of the consummation of the transactions in question or, if not, shall be appropriately explained on the accounting, bills, or statements issued.

[19 F.R. 4530, July 22, 1954, as amended, 24 F.R. 3183, Apr. 24, 1959]

9 C.F.R. 201.71:

§ 201.71 Accurate weights

Each stockyard owner, market agency, dealer, or licensee who weighs livestock or live poultry shall install, maintain, and operate the scales used for such weighing so as to insure accurate weights. All livestock scales shall be equipped with a type-registering weigh-beam, a dial with a me-

chanical ticket printer, or a similar device which shall be used for printing or stamping the weight values on scale tickets.

[32 F.R. 13233, Sept. 20, 1967]

9 C.F.R. 201.72:

§ 201.72 Scales: testing of

Each stockyard owner, market agency, dealer, or licensee who weighs livestock or live poultry for purposes of purchase or sale or who furnishes scales for such purposes shall cause such scales to be tested properly by competent agencies at suitable intervals in accordance with instructions of the Administrator, copies of which will be furnished to each stockyard owner, market agency, dealer, or licensee. [24 F.R. 3183, Apr. 24, 1959, as amended at 26 F.R. 1626, Feb. 24, 1961; 32 F.R. 7700, May 26, 1967]

9 C.F.R. 201.73-1(a)(1):

(a) *Balancing the empty scale.* (1) The empty scale shall be balanced each day before weighing begins, and maintained in correct balance which weighing operations continue. The zero balance shall be verified at intervals of not more than 15 drafts or 15 minutes, whichever is completed first. In addition, the zero balance of the scale shall be verified whenever a weigher resumes weighing duties after an absence from the scale and also whenever a load exceeding half the scale capacity or 10,000 pounds (whichever is less) has been weighed and is followed by a load of less than 1,000 pounds, verification to occur before the weighing of the load of less than 1,000 pounds.

United States Court of Appeals
For the Fifth Circuit

October Term, 1976

No. 76-4500

Summary Calendar

Livestock Marketers, Inc. and Paulk and Batten Livestock
Company, Inc.,

Petitioners,

versus

United States of America,

Respondent.

Petition for Review of an Order of
U. S. Department of Agriculture (Georgia Case)

Before GOLDBEG, CLARK and FAY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the petition of Livestock Marketers, Inc. and Paulk and Batten Livestock Company, Inc. for review of an order of the U. S. Department of Agriculture; and was taken under submission by the Court upon the record and briefs on file; pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the U. S. Department of Agriculture in this cause be, and the same is hereby affirmed;

It is further ordered that petitioners pay to respondent, the costs on appeal to be taxed by the Clerk of this Court.

September 1, 1977

Issued as Mandate: Oct. 28, 1977.

LIVESTOCK MARKETERS, INC. and
Paulk and Batten Livestock
Company, Inc., Petitioners,

v.

UNITED STATES of America,
Respondent.

No. 76-4500

Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

Sept. 1, 1977.

Two corporate livestock dealers petitioned for review of an order of the Department of Agriculture suspending both dealers as registrants under the Packers and Stockyards Act and requiring the dealers to cease and desist from practices allegedly in violation of the Act. The Court of Appeals held that: (1) substantial evidence supported the finding that the scale at the stockyard at which the dealers did business had been intentionally back-balanced to cause short weighing of livestock; (2) the suspension for 30 days was not unreasonably lengthy, and (3) under the unusual circumstances wherein the two corporate entities were owned and managed by the same individuals and functioned largely as a single entity using the same stockyard facility and achieving a single profit, it was within the authority of the Secretary of Agriculture to suspend both corporations for 30 days, even though none of the violations discovered could be tied directly to one of the corporations.

Order affirmed.

* Rule 18, 5 Cir., *Isbell Enterprises, Inc. v. Citizens Casualty Company of New York et al.*, 5 Cir., 1970, 431 F.2d 409, Part I.

1. Trade Regulation Key 872

Evidence relating to three separate sales of hogs by representatives of the Department of Agriculture to registered livestock dealer sufficiently supported conclusion that livestock dealer had violated the Packers and Stockyards Act by intentionally back-balancing scale at stockyard in order to cause short weighing of livestock. Packers and Stockyards Act, 1921, §§ 1 et seq., 312, 7 U.S.C.A. §§ 181 et seq., 213.

2. Trade Regulation Key 872

In view of fact that 30-day suspension for short weighing was not without precedent and was a reasonable deterrent to violations in an area of serious concern, suspension of registered livestock dealers for 30 days upon finding that the dealers had intentionally back-balanced a livestock scale to cause short weighing was not unreasonably lengthy. Packers and Stockyards Act, 1921, §§ 1 et seq., 312, 7 U.S.C.A. §§ 181 et seq., 213; Department of Agriculture Appropriation Act, 1944, § 1, 7 U.S.C.A. § 204.

3. Trade Regulation Key 872

Where circumstances surrounding operations of two corporate registered livestock dealers included fact that the corporations were owned by the same four individuals and managed by the same three and that, prior to finding that one of the corporations had violated the Packers and Stockyards Act by intentionally back-balancing livestock scale to cause short weighing, the Department of Agriculture had warned both corporations with respect to the same set of scales and where the corporations did not deal at arm's length but functioned largely as a single entity using the same stockyard facility and achieving a single profit on many transactions, it was within the authority of the Secretary of Agriculture to suspend both corporations as registrants

under the Act for 30 days even though none of the violations found could be tied directly to one of the corporations. Packers and Stockyards Act, 1921, § 312, 7 U.S.C.A. § 213; Department of Agriculture Appropriation Act, 1944, § 1, 7 U.S.C.A. § 204.

On Petition for Review of an Order of U. S. Department of Agriculture (Georgia Case).

Before GOLDBERG, CLARK and FAY, Circuit Judges.

PER CURIAM:

Appellants challenge an order of the Secretary of Agriculture. Appellant Livestock Marketers, Inc. is registered with the Secretary as (1) a market agency to buy and sell livestock on a commission basis at Livestock Marketers Inc., Douglas, Georgia, a posted stockyard subject to the provisions of the Packers and Stockyards Act of 1921, 7 U.S.C. §§ 181 *et seq.* (hereinafter "the Act"), and (2) as a dealer to buy and sell livestock in commerce. Appellant Paulk and Batten Livestock Company, Inc., also does business at the Livestock Marketers, Inc. facility at Douglas, Georgia, and is registered with the Secretary as a dealer to buy and sell livestock in commerce. The same four individuals own the two appellant corporations in equal shares.

On the basis of three separate sales of hogs by representatives of the Department of Agriculture to appellant Livestock Marketers, Inc., the Judicial Officer¹ below concurred in the conclusion of the Administrative Law Judge that Livestock Marketers,

¹ The Secretary of Agriculture has delegated to the Judicial Officer final administrative authority to decide the department's cases subject to the Administrative Procedure Act. Representatives of the department instituted the case at bar by filing a complaint against appellants, who were respondents below.

Inc., "knowingly weighed livestock at less than their true and correct weights and to facilitate such shortweighing did not issue scale tickets to the sellers of such livestock," in violation of 7 U.S.C. § 213 and applicable regulations thereunder. See 9 CRF §§ 201.46, 201.49, 201.71, 201.73-1. The Judicial Officer thereupon ordered both appellants to cease and desist from the violative practices; additionally, he suspended both appellants as registrants under the Act for 30 days. See 7 U.S.C. § 204.

[1, 2] Appellants attack the adequacy of the record to support either the finding of statutory violations or the length of the suspension sanction. Both of these attacks fail in light of the narrow applicable standards of judicial review. Substantial evidence supports the conclusion that the scale at the Livestock Marketers, Inc. facility had been intentionally back-balanced to cause shortweighing. Regarding the length of the suspension, the Supreme Court has recently stated that the Secretary's choice of sanction is not to be overturned unless "unwarranted in law or without justification in fact." *Mutz v. Glover Livestock Comm'n Co., Inc.*, 411 U.S. 182, 185-86, 93 S.Ct. 1455, 1458, 36 L.Ed.2d 142 (1973). The 30 day sanction for shortweighing even in the relatively slight percentages here is not without precedent; we cannot quarrel with the reasonableness of its selection as a deterrent to violations in this area of serious concern.

[3] Appellants' most troubling objection is to the application of any sanction to Paulk and Batten Livestock Company, Inc. None of the short-weight disclosing purchases set up by government agents involved Paulk and Batten. None of the violations found may be tied directly to that corporate entity.

Nonetheless the Judicial Officer reasonably determined that a suspension sanction applied only to Livestock Marketers would in these peculiar circumstances amount to no sanction at all. Livestock Marketers sells almost all its livestock to Paulk and Batten, which sells to packers. Ownership of the two entities is

identical. Of the four owners, the same three manage operations of the two companies. The record discloses many transactions in which from the time livestock is sold from Livestock Marketers through Paulk and Batten to a packer, only a single mark-up is taken. Thus the two appellants do not deal at arms length, but function largely as a single entity, using the same facility and achieving a single profit.

In similar circumstances the Secretary has found it necessary to issue cease and desist orders to owners of corporations in their individual capacities. The courts have upheld such veil-piercing orders as necessary to effect the statutory scheme, despite the lack of direct authorizing language. See *Bruhn's Freezer Meats of Chicago, Inc. v. United States Department of Agriculture*, 438 F.2d 1332 (8th Cir. 1971); *Sebastopol Meat Company v. Secretary of Agriculture*, 440 F.2d 983 (9th Cir. 1971). In the unusual circumstances here, when both appellants functioned to a great extent as a single entity prior to the finding of the violation and where the department warning regarding weighing discrepancies put both corporations on notice with respect to the same set of scales some nine months prior to the violation, application of the suspension sanction to both was within the authority of the Secretary. We emphasize that this conclusion is strictly tied to the complete identity of ownership, operation, income, and facilities of the two appellants.

The order of the Secretary is AFFIRMED.

In the United States Court of Appeals
For the Fifth Circuit

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No. 76-4500
—————

Livestock Marketers, Inc. and Paulk and Batten Livestock Com-
pany, Inc.,

Petitioners,

versus

United States of America,

Respondent.

—————
On Petition for Review of an Order of
U. S. Department of Agriculture
(Georgia Case)
—————

ON PETITION FOR REHEARING

(October 20, 1977)

Before GOLDBERG, CLARK and FAY, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the
above entitled and numbered cause be and the same is hereby
DENIED.

ENTERED FOR THE COURT:

IRVING L. GOLDBERG
United States Circuit Judge